MALAYAN UNITED FINANCE BHD.

v.

SYKT. TIAM CHOY MOTO & ORS.

HIGH COURT MALAYA, MELAKA
WAN YAHYA J
[CIVIL SUIT NO. 38 OF 1979]
17 FEBRUARY 1983

CIVIL PROCEDURE: *Application to amend interlocutory and final judgment - Whether amendment intended to correct mistake in judgment - Whether irregularity or nullity - Whether inexpedient or inequitable.*

The plaintiff (appellant) sued the 1st defendant for breach of contract, for damages and other consequential remedies, and the 2nd and 3rd defendants on their guarantees. On 2 August 1979, in default of appearance of the 2nd and 3rd defendants, the plaintiff entered final judgment against them under O. 13 r. 1, Rules of the High Court, having requested judgment for 4 out of the 8 prayers originally asked for. The applications of the defendants to have the judgment set aside were dismissed on 13 November 1979.

After obtaining judgment against the 1st defendant and three years after the dismissal of the applications to set aside the judgment in default the plaintiff applied under the slip rule under O. 20 r. 11 to amend the default judgment by adding prayer for such further sums as paid by the hirers to the 1st defendant after 28 February 1979. This prayer had appeared in prayer (b) of the plaintiff's statement of claim. The application was dismissed by the Registrar.

Held:

[1] The plaintiff had failed to satisfy three other requirements, other than that he was a party to the judgment. An application for the exercise of the Court's discretion under O. 20 r. 11 can only be exercised if all four requirements are satisfied. [*Re. An Application By Morly Laboratory Ltd.* [1952] 1 All ER 1058; *Thynne (Bath, Marchioness) v. Thynne (Bath, Marquess)* [1952] p. 272; *Mercer Alloys Corporation & Anor. v. Rolls Royce Ltd.* [1972] 1 All ER 211; *Moore v. Buchanan* [1967] 1 WLR 1341].

[2] The proposed amendment was not intended to correct a mistake. The learned Registrar gave effect only to the prayers contained in the order prepared by the plaintiff. There was no intention to include other prayers not mentioned therein.

[3] The granting of the prayer was not within the competence of the Court and would be an irregularity or nullity. The demand of the plaintiff of unspecified sums in expectation or anticipation of its future payment was not a liquidated demand within the meaning of O. 13 r. 1(1), Rules of the High Court. The effect of the plaintiff's amended prayer, if allowed, would entitle him not only to the specified amount which was due to him at the date of the judgment, but also to other future unascertainable sums.

[4] It would be inexpedient and inequitable to allow the application. The application for amendment, if it had been acceded to, would have resulted in the defendants being deprived of the opportunity to challenge that part of the judgment which would have been available to them at the time of their application to set aside the judgment in default. Furthermore, the application to amend was almost three years after the judgment was obtained.

[5] The plaintiff could proceed by way of supplemental order, should he be in a position to adduce new facts of payments to the 1st defendant after the date of judgment, and was so minded to act.

[Appeal dismissed.]

Cases referred to:
Re An Application By Morly Laboratory Ltd. [1952] 1 All ER 1057
MacCarthy v. Agard [1933] 2 KB 417
Mercer Alloys Corporation & Anor. v. Rolls Royce Ltd. [1972] 1 All ER 211
Moore v. Buchanan [1967] 1 WLR 1341

Legislation referred to:
Rules of the High Court, O. 13 r. 1, (1), O. 20 r. 11

For the plaintiff - Andrew Goh Tiow Soon
For the 2nd & 3rd defendants - Tan Yip Lip

JUDGMENT

Wan Yahya J:

This is an appeal against the order made by the learned Assistant Registrar on 4 August 1982 wherein he refused the application made by the plaintiff to amend the interlocutory and final judgment obtained against the 2nd and 3rd defendants.

The history of this case can be shortly stated as follows: The plaintiff, a finance company, sued the 1st defendant, a motor vehicle dealer, for breach of contract, damages and other consequential remedies. The plaintiff's claim against the 2nd and 3rd defendants is by virtue of a guarantee entered into by them in favour of the plaintiff whereby they agreed to indemnify him against all sums due to him from the 1st defendant in accordance with agreement. On 20 February 1979 the plaintiff alleged he terminated the master agreement between the 1st defendant and himself and subsequently the plaintiff wrote to all the hirers requesting them to make all future instalments directly to him instead of the 1st defendant. Some of the hirers complied but others refused.

In his statement of claim the plaintiff specified the following prayers:

(a) The sum of RM5,415.75;

(b) Such further sums of the monthly instalments paid by the plaintiff's hirers to the 1st defendant after the 28 February 1979;

(c) Damages for breach of contract;

(d) Interest on the sum awarded in respect of (a), (b) and (c) above at the rate of 6% per annum from the date hereof until full payment and or realisation;

(e) An order against the 1st defendant for the return of all the account books kept by the 1st defendant on behalf of the plaintiff, the registration books of the motor vehicles and the insurance policies of these vehicles;

(f) An injunction restraining the 1st defendant whether by himself or by his servants or agents or otherwise from collecting the monthly instalments due to the plaintiff from the plaintiff's hirers introduced by the 1st defendant who continue to pay to the 1st defendant instead of to the plaintiff direct;

(g) Such further relief as this Court thinks just; and

(h) Costs.

On 2 August 1979, in default of appearance of the 2nd and 3rd defendants, the plaintiff entered final judgment against them under O. 13 r. 1 of the Rules of the High Court.

In the judgment prepared and submitted by him to the Assistant Registrar the plaintiff requested for the following:

(i) The sum of RM5,415.75;

(ii) Damages to be assessed;

(iii) Interest on the sum of RM5,415.75 and damages assessed at the rate of 6% per annum from 9 May 1977 to the date of payment or realisation; and

(iv) Costs to be taxed on the higher scale.

It is noticeable by comparison with his Statement of Claim that the plaintiff was merely seeking judgment for 4 out of the 8 prayers he had originally asked. It was also obvious that the plaintiff's solicitor was fully aware of what he was doing, for, as much as the learned Assistant Registrar observed, the judgment was prepared by him for his signature without resorting to the normal practice of putting up a draft for approval.

Both defendants took immediate steps to set aside the judgment but their applications were dismissed by the Court on 13 November 1979.

Almost three years after obtaining the judgment in default, i.e. on 4 August 1982, after the 2nd and 3rd defendants' applications to set aside the judgment had been refused and after obtaining judgment against the 1st defendant, the plaintiff applied under the slip rule to amend the default judgment by adding to it the following prayer, which appears in prayer (b) of his Statement of Claim:

> Such further sums of the monthly instalments paid by the plaintiff's hirers to the 1st defendant after the 28 February 1979.

The learned Registrar, after hearing the parties, dismissed the application by the plaintiff. He was of the view that, since the agreement, which extended their obligation to indemnify the plaintiff in the event of default of payment of monies received by the 1st defendant, had been terminated on 20 February 1979, both the 2nd and 3rd defendants could not be held liable for the sums received by the 1st defendant after that date. The learned Registrar also found that the application was not made, as asserted by the plaintiff, to express the manifest intention of the Court, since the Court could not have intended to give judgment for something which it could not have lawfully given. He also held that the omission was not accidental.

Order 20 r. 11 of the Rules of the High Court, commonly known as the 'slip rule' reads:

> Clerical mistakes in judgments or orders or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court by summons without an appeal.

In my opinion the slip rule applies only to (i) clerical mistakes and (ii) errors resulting from accidental slip or omission made by the Court or its officials in respect of its own judgments or orders. An application for the exercise of the Court's discretion under this rule, i.e., O. 20 r. 11, can only be exercised if

(a) the applicant is a party to the judgment - see *Re. An Application By Morly Laboratory Ltd.* [1952] 1 All ER 1057 at 1058 per Sir Raymond Evershed MR

> Then the question is raised whether, the mistake (*viz*., the omission) having been made, anyone other than Morly Laboratory, Ltd. can apply under RSC O. 28 r. 11, to have it put right. In my view, **any party to the action** is entitled to come to the Court and draw the attention of the Court to the fact (if it be the fact) that a slip has been made in the order, even though the putting right of the slip does not, in fact, benefit, and may even injure, the party making the application.

(b) the proposed amendment to the order or judgment is intended to correct a mistake in the judgment and to bring it in line with the manifest intention of the Court - see *Thynne (Bath, Marchioness) v. Thynne (Bath, Marquess)* [1952] p. 272 and in particular at p. 283 to the reference made on the judgment of Greer LJ in the case of *MacCarthy v. Agard* [1933] 2 KB 417 as follows:

> No doubt the judgment was drawn up by a clerk in the office, but as drawn up it accurately represented what the master decided. In the Annual Practice for 1933 the statement on p. 480 accurately represents the position. It is there said: "The error or omission must be an error in expressing the manifest intention of the Court; the Court cannot correct a mistake of its own in law or otherwise, even though apparent on the face of the order, such as a mistake due to a misunderstanding of a rule or statute. If the order as drawn correctly expressed the intention, it cannot be corrected under this rule or the inherent jurisdiction, even if the decision of the Court is procured by fraud or misrepresentation."

Also applied in *Mercer Alloys Corporation & Anor. v. Rolls Royce Ltd.* [1972] 1 All ER 211:

(c) the proposed amendment to that part of the judgment will not render it irregular or a nullity; and

(d) it is not inexpedient or inequitable to do so - see *Moore v. Buchanan* [1967] 1 WLR 1341 where it was held that:

> although the Court was always competent, on an application under the slip rule, to correct the judgment, it has jurisdiction to exercise its discretion not to do so, not only in cases where the rights of third parties had intervened, but in cases where something had happened since the date of the oral judgment which rendered it inexpedient or inequitable so to do.

On the basis of the above-named criteria I would hold that, except for the first above-mentioned principle, the appellant had failed to satisfy the three other requirements. In this case, as mentioned earlier, the learned Registrar only gave formal effect to the prayers contained in the order prepared by the appellant. It has never been his intention to include other prayers not mentioned therein. If it was not in his contemplation in the first place, when signing the order, to allow for the order subsequently sought to be included, how could it be said that this prayer was explicitly intended to be given by the Court?

On the third matter outlined in (c) above the appellant seeks to add the following prayer to his order:

> Such further sums of the monthly instalments paid by the plaintiff's hirers to the 1st defendant after the 28 February 1979.

The effect of this amendment is to make the guarantors further liable not only for those sums which the 1st defendant could have possibly obtained from the hirers but also liable for future sums that may be paid to him subsequent to the date of judgment, the exact amount of such payments the appellant being unable to quantify. The question to be decided here is whether the granting of that prayer itself is within the competence of the Court and whether it is an irregularity or nullity.

The procedure for entering judgment in default of appearance in High Court cases is contained in O. 13 r. 1 of the Rules of the High Court, which reads as follows:

> (1) Where a writ is indorsed with a claim against a defendant for a **liquidated demand only,** then, if that defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing, enter final judgment against that defendant **for a sum not exceeding that claimed by the writ** in respect of the demand and for cost, and proceed with the action against the other defendants, if any.
>
> (2) A claim shall not be prevented from being treated for the purposes of this rule as a claim for a liquidated demand by reason **only** that part of the claim is for **interest accruing after the date of the writ** at an unspecified rate, but any such interest shall be computed from the date of the writ to the date of entering judgment at the rate of 8 per cent.

My understanding of the above rule is that it restricts the type of judgment, which a plaintiff can obtain in default of appearance of the defendant only (i) to a claim for a liquidated demand which does not exceed the amount specified on the writ; (ii) to interest accruing after the date of the writ to be computed at 8 per cent and (iii) costs.

In my opinion, a liquidated demand is similar to a debt. It must be a specific sum of money recoverable under a contract. The sum so demanded must have either been ascertained or is ascertainable. The **explicit** test to determine whether a demand is a liquidated demand or not lies in the question whether the sum demanded can be ascertained by a matter of arithmetic, i.e. by mere calculations, or by having to go through further enquiries or investigation. If that amount, including the costs, and interest, can be determined by calculation, then the sum demanded is a liquidated demand. If, on the other hand, the party making the demand has to carry out some process of investigation before he could make out the actual amount due, then the sum demanded is not a liquidated demand but constitutes damages.

The effect of the appellant's amended prayer, if allowed, would entitle him not only to the specified amount which was due to him at the date of the judgment, but also to other future unascertainable sums which the plaintiff suspects could have come into the hands of the 1st defendant after judgment was given, but in respect of these sums he could neither quantify nor particularize appreciably. As mentioned in the early part of this judgment, the plaintiff, upon terminating the master agreement between himself and the 1st defendant, had requested the hirers to pay all instalments due directly to him and had on several occasions in fact collected these instalments. It is quite impossible at the time of the judgment therefore for the plaintiff to determine which of the hirers would be paying to him and which to the 1st defendant. Unless he conducts further investigations and until this information is in his hands, he is in no position to account for the sums which the hirer will be remitting to the 1st defendant after date of judgment.

I hold that the demand by the plaintiff of unspecified sums in expectation or anticipation of its future payment is not a liquidated demand within the meaning of O. 13 r. 1(1) of the Rules of the High Court.

The final matter to be considered here, as in (d) above, is whether it is not inexpedient or inequitable for the Registrar to grant the application by the plaintiff. For this purpose it may be noted that the judgments in default were obtained against the 2nd and 3rd defendants on 2 August 1979. On the very same day the plaintiff extracted the order prepared by him and signed by the learned Assistant Registrar. In this order the plaintiff chose to obtain judgment specifically on four out of the eight prayers he had originally prayed for. The defendants applied to set aside this judgment but their applications were dismissed by this Court on 4 October 1979. It is pertinent to note that, as both the applications by the defendants and the subsequent ruling of this Court were founded on the extracted judgment containing the four specified orders only, the issue regarding the alleged further sums paid by the plaintiff's hirers to the 1st defendant after the date of judgment was never raised or argued at all. The application for amendment, if acceded to by the learned Registrar, would have resulted in the defendants being deprived of the opportunity to challenge that part of the judgment which would have been available to them at the time of their application.

Yet another point to note is that, although judgment was obtained on 2 August 1979 and the order extracted on the same day, the application to amend under the slip rule was made on 20 May 1982 - almost 3 years after judgment was obtained and after a lot of water had flown under the bridge. Under the circumstances I would hold that it would be inexpedient and inequitable to allow the application.

On the premises of the above-named reasons I find that the plaintiff has failed to satisfy this Court on three out of the four criteria outlined above. Although the learned Assistant Registrar's ground for refusal in his judgment partially differs from mine, it nevertheless relates to the same substance as mentioned in the first test (a) above, i.e., irregularity in the proposed amended judgment. I shall therefore uphold his judgment and order that this appeal be dismissed with costs.

Should the plaintiff now be in a position to adduce new facts to account for the sums which he can prove to have been delivered into the hands of the 1st defendant since the date of judgment, and he is so minded to act, he may proceed by way of supplemental order.

Also found at [1983] 1 CLJ 307